

OFFICE OF THE CITY ATTORNEY

City of Miami Beach

F L O R I D A



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January 13, 2010

Michael B. Glomb, Esq.
Feldesman, Tucker, Leifer, Fidell, LLP
2001 L Street, N.W.
Second Floor
Washington, D.C. 20036-4910

Re: CDBG Grant Conflict Issue

Dear Mr. Glomb,

I have reviewed your attached email and Memorandum, and in recognition of your representation that "MBCHC authorized us to release the memorandum to you to expedite the exchange of communications with the City", consider said correspondence as the Miami Beach Community Health Center's disclosure of a "possible conflict of interest or apparent impropriety" with regard to applicable regulations--this letter shall therefore serve as the City's binding opinion thereon¹.

I. Agreement requires Provider's compliance with Conflict of Interest laws.

The subject Agreement² requires that as the "Provider" of services, the Health Center comply with applicable regulations governing Conflict of Interest:

--"It is expressly understood and agreed by the parties that monies to be used by Provider for compensation, as contemplated by this Agreement, originate from grants of CDBG funds from the U.S. Department of Housing and Urban Development (HUD) and **must be implemented in full compliance with all of HUD's rules and regulations....**"³.

Id. at section 7. Additional Conditions and Compensation.

--"The Provider agrees to comply with all applicable federal regulations as they may apply to Program administration and to carry out each activity in compliance with the laws and regulations

¹ Section 22 of the October 1, 2008 Community Development Block Grant Agreement (hereafter "Agreement") Between the City of Miami Beach and Miami Beach Community Health Center, Inc. provides: "The Provider covenants that no person under its employ who presently exercises any functions or responsibilities in connection with Community Development funded activities has any personal financial interests, direct or indirect, in this Agreement. The Provider covenants that in the performance of this Agreement, no person having such conflicting interest shall be employed. The Provider covenants that it will comply with all provisions of 24 CFR 570.611 "Conflict of Interest", and the Federal, State, County and City of Miami Beach statutes, regulations, ordinances or resolutions governing conflicts of interest. The Provider shall disclose, in writing, to the City any possible conflicting interest or apparent impropriety that is covered by the above provisions. This disclosure shall occur immediately upon knowledge of such possible conflict. The City will then render an opinion, which shall be binding on both parties." (Emphasis added.)

² This Agreement's term is for the period commencing October 1, 2008 through September 30, 2009.

³ In citing to relevant Agreement language, emphasis has been added herein.

as described in 24 CFT 570 Subpart K, as same may be amended from time to time. Additionally, the Provider will comply with all state and local (City and County) laws and ordinances hereto applicable. It shall be the Provider's sole and absolute responsibility to continually familiarize itself with any and all such applicable federal, State, County, and City regulations, laws, and/or ordinances."

Id. at section 8. Compliance with Local, State and Federal Regulations.

--"...the City may also place the Provider in default of this Agreement, and may suspend or terminate this Agreement, for cause. 'Cause' shall include, but not be limited to, the following:

a. **Failure to comply and/or perform in a material way**, as same shall be determined by the City in its sole discretion and judgment, in accordance with the terms of this Agreement, or any Federal, State, County or City statute or regulation. ...". "...Notwithstanding the preceding, the City reserves any and all legal rights and remedies it may have with regard to recapture of the CDBG funds herein, or any assets acquired or improved in whole or in part with said funds."

Id. at section 12.2. Termination of Agreement.

--"The Provider agrees to abide by guidelines set forth by HUD for the administration and implementation of the CDBG Program, including...applicable federal laws and regulations set forth in 24 CFR 570.600, et seq. ...".

Id. at section 17. Conformity to HUD regulations.

--"The Provider covenants that no person under its employ who presently exercises any functions or responsibilities in connection with Community Development funded activities has any personal financial interests, direct or indirect, in this Agreement. The Provider covenants that in the performance of this Agreement, no person having such conflicting interest shall be employed. The Provider covenants that it will comply with all provisions of 24 CFR 570.611 "Conflict of Interest", and the Federal, State, County and City of Miami Beach statutes, regulations, ordinances or resolutions governing conflicts of interest. ...".

Id. at section 22. Conflict of Interest.

Accordingly, the Health Center was contractually required to comply with Federal, State, County and City conflict of interest laws.

II. Interpretation of Applicable Conflict Laws

A. Federal Law.

Pursuant to 24 CFR 570.611(b):

"...no person described in paragraph (c) of this section who exercise or have exercised any functions or responsibilities with respect to CDBG activities assisted under this part⁴, or who are in a position to participate in a decision-making process or gain inside information with regard to such activities, may obtain a financial interest or benefit from a CDBG-assisted activity, have a financial interest in any contract, subcontract, or agreement with respect to a CDBG assisted activity, or with respect to the proceeds of the CDBG assisted activity, either for themselves or those who whom they have business or immediate family ties, during their tenure or for one year thereafter."⁵

During his tenure as a member of the City's Community Development Advisory Committee ("CDAC"), Dr. Baum informed the City that he began discussing with the Health Center the idea of starting a program to provide chiropractic services in August 2008, wherein (according to Dr. Baum) he was asked to work as an independent contractor and not as an employee. At this time, as recipient/City's local

⁴ The chiropractic services provided by Dr. Baum at issue herein were "CDBG activities assisted" under the subject Agreement. See Agreement at Attachment I, "Description of Program": "...Services include regular preventive general medical care as well as acute care and referrals for specialty care ..."

⁵ This Federal regulation was further set forth within the Agreement. See Agreement at Attachment IV "Applicable Federal Regulations", at pg 4 of 7.

counsel, I confirmed to City staff and to Dr. Baum that in addition to State, County and City ethics laws, pursuant to 24 CFR 570.611(b), Dr. Baum was prohibited from obtaining a financial interest or benefit from a CDBG-assisted activity during his tenure as a member of CDAC and for a period of one year thereafter. Subsequently, on September 17, 2008, Dr. Baum resigned his CDAC membership. Dr. Baum represented to the City that he had not been working for the Clinic prior to his resignation.

According to your email, the Health Center's timeline concerning its relationship with Dr. Baum is as follows: Dr. Baum's provided x-ray services to the Center's clients from July 2007 through December 2009, and provided chiropractic services to the Center's clients from August 15, 2008 until September or October 2008⁶ after which time the Center "made other arrangements for patient chiropractic services". During these time periods, Dr. Baum was an appointed member of the City's CDAC--of particular significance is the fact that in July 2008 Dr. Baum voted in favor of funding the Clinic's request for CDBG funds.

Under the facts you have provided, Dr. Baum appears to have received a financial benefit from a CDBG-funded activity during the prohibited period, i.e. during his tenure as a member of CDAC and the one year period thereafter. Although the Health Center may not have directly paid Dr. Baum and there was no contract between the Health Center and Dr. Baum, his receipt of compensation from clients of the Health Center stemmed directly from CDBG-funded activities, constituting prohibited financial gain on his part⁷. Although the Federal Conflict of Interest law at issue herein proscribes conduct of Dr. Baum as the appointed CDAC member (and presumably as the agent of the subrecipient/Center) and does not per se impute liability upon a third party entity which contracts with said person, pursuant to the above-cited section 22 of the Agreement the Health Center obligated itself to comply with such Federal law and to not employ⁸ any person violating such regulation. Nonetheless, the fact that the Health Center had no knowledge that its relationship with Dr. Baum may have violated Federal law is significant, particularly in light of the otherwise full compliance the Health Center exhibited towards its duties under the Agreement, which compliance clearly benefitted a segment of the community in need of its services. Moreover, it appears that once it became aware of the potential conflict violations by Dr. Baum, the Health Center contacted the City, thus seeking to mitigate⁹ any actual and/or appearance of conflict resulting from its relationship with Dr. Baum.

B. State and County Law.

Pursuant to Miami-Dade County and State of Florida Ethics laws, an appointed City board member is prohibited from receiving compensation from an entity which has "...applied for or seeking some benefit from the City of a City Agency, in connection with the particular benefit sought by the third person." Miami-Dade County Code section 2-11.1(m)(1), and Florida Statute section 112.313(7)(a), prohibiting an appointed official from having any "employment or contractual relationship" with an entity which is subject to the regulation of or is doing business with, the City of Miami Beach. Furthermore, an appointed City board member is generally prohibited from voting on a matter in which he would be directly affected, or in which he would receive a special private gain. Miami-Dade County Code section 2-11.1(v), and Florida Statute section 112.3143(3)(a)—in the event of such conflict, the subject board member is required to abstain from vote and leave the subject meeting during discussion of the item. Miami Beach City Code section 2-458.

Under the facts provided by the Health Center, it would appear that Dr. Baum may have violated the subject local conflict laws.

⁶ The City was not aware of Dr. Baum's services to the Health Center's clients until October 27, 2009 (which relationship was confirmed via City's meeting with Health Center on December 7, 2009), subsequent to expiration of the subject post-tenure one-year conflict period.

⁷ According to your email, the Center takes the position that neither Center funds nor CDBG funds were used to pay Dr. Baum.

⁸ Dr. Baum has maintained that he was not "employed" by the Center, instead serving as an independent contractor.

⁹ In your attached December 23 2009 Memorandum to the Health Center, you have recommended that the Center not engage Dr. Baum "until this matter is resolved with the City".

However, just as the proscription in Federal conflict laws proscribe conduct of the affected City official, the State, County and City of Miami Beach conflict laws are also limited in their applicability to City officials and employees, and do not per se apply to a third party entity with which a City board member had a relationship. Under the facts provided, the Health Center has thus not violated such local ethics laws. Moreover, the Clinic's representation that it was unaware that Dr. Baum's relationship may have been violative of such ethics laws is significant for purposes of assessing its good faith compliance with the subject Agreement, and its further attempt to mitigate any conflict of interest that may have occurred as a result of Dr. Baum's receipt of payment from the Center's clients.

III. Conclusion.

The City of Miami Beach will present this matter to HUD for its review and assessment concerning what, if any, possible action HUD may take or recommend for the City. In light of the above analysis, and accepting the facts as presented by the Health Center, it is the City's position that the Health Center not be penalized for its relationship with Dr. Baum, and in this regard, the City will not at this time institute any action against the Health Center for reimbursement of funded CDBG monies, instead reserving to itself any and all legal rights and remedies it may have with regard to recapture of the CDBG funds herein, per section 12.2 of the Agreement.

Notwithstanding the above, in its communication with HUD the City will request that should HUD determine that the Federal conflict rules were violated, that an exception to such conflict rules be granted pursuant to 24 CFR 570.611(d) in light of the following:

--disclosure of the nature of potential conflict has been made via this public record, which public record has been transmitted to the City Clerk as the City's official records custodian for placement in the official public records of the City of Miami Beach; further, this record has been placed on the City of Miami Beach's website¹⁰ for public disclosure; and

--the opinion of the City's local counsel, as expressed hereinabove, that under the facts provided, neither the City of Miami Beach or the Health Center violated applicable State of Florida, Miami-Dade County, or City of Miami Beach laws.

The City of Miami Beach believes that HUD's grant of exception would serve the purposes of the Act and the effective and efficient administration of the City's program, taking into account the cumulative effect of the following factors:


- despite the fact that Dr. Baum served as a member of CDAC during the time period in which he was providing services to clients of the Health Center, there was an opportunity for open competitive bidding/negotiation with regard to the subject 2008-2009 funding year. Dr. Baum was one of eleven CDAC members who participated in the review and selection process of all sub-recipients, the application process took place at publicly-noticed meetings, with final selection of sub-recipients occurring at a public meeting of the Miami Beach City Commission;
- the persons served by the Health Center are members of a group or class of low or moderate income persons, who are the intended and actual beneficiaries of the Health Center, and the exception will permit such persons to continue to receive funded services of the Center. It should be noted that the Health Center is the sole Federally-Qualified HealthCare Center to serve the residents of the City of Miami Beach ;
- Dr. Baum has resigned from the CDAC board, and has thus withdrawn from his functions or responsibilities, or the decision making process with respect to the specific assisted activity in question. Moreover, the Health Center has stated its intention to discontinue any further relationship with Dr. Baum; and

¹⁰ <http://web.miamibeachfl.gov/housingcommdev/scroll.aspx?id=35626>

- undue hardship will result to both the City and Health Center should an exception not be granted when weighed against the public interest served by avoiding the prohibited/perceived conflict.

As counsel for the Health Center, you will be copied on the City's correspondence to HUD. Once the City receives response from HUD on this matter, you will be notified as to the action, if any, to be taken by the City with regard to the Health Center.

Very truly yours,



Jean Olin
Special Counsel
City of Miami Beach

cc: Jose Smith, CMB City Attorney
Hilda Fernandez, CMB Asst City Manager
Anna Parekh, CMB Director, Housing/Community Development
Maria Ruiz, CMB Division Director, Community Services
Robert Parcher, CMB City Clerk
Dr. Michael Baum

Olin, Jean

Subject: FW: Miami Beach Community Health Center

Attachments: MBCHC Conflict Memo 12 23 09.pdf

From: Glomb, Mike [mailto:MGlomb@feldesmantucker.com]

Sent: Tuesday, December 29, 2009 4:14 PM

To: Olin, Jean

Cc: Abbate, Kathryn; Rabinowitz, Mark

Subject: Miami Beach Community Health Center

Jean Olin, Esq.
Special Counsel
City Attorney's Office
City of Miami Beach
1700 Convention Center Drive, 4th Floor
Miami Beach, Florida 33139

RE: Miami Beach Community Health Center (MBCHC)

Dear Ms. Olin:

Think you for discussing the CDBG issue with me yesterday.

As promised, I am enclosing a copy of a memorandum that we prepared for MBCHC addressing the CDBG conflict of interest regulations. We are providing this memorandum in support of MBCHC's position in this matter. MBCHC authorized us to release the memorandum to you to expedite the exchange of communications with the City. However, such authorization does not constitute and should not be interpreted as a waiver of MBCHC's privilege regarding the underlying attorney-client communications, which privilege is expressly reserved.

With respect to the time line regarding Dr. Baum's relationship with MBCHC, I am advised as follows:

July, 2007 to December 1, 2009 - Dr. Baum provided X-ray services to MBCHC patients. Dr. Baum was one of the referral options given to patients requiring radiology services. Dr. Baum billed patients and/or third party payers for the services. MBCHC did not pay Dr. Baum for such services. There was no contract between Dr. Baum and MBCHC for radiology services.

August 15, 2008 - Dr. Baum began to provide chiropractic services to MBCHC patients. After Dr. Baum informed MBCHC (which we believe was some time in September or early October, 2008) that he could not contract with MBCHC until one year after his resignation from the CDAC, MBCHC made other arrangements for patient chiropractic services. Dr. Baum did not have a contract with MBCHC at any time nor has he been paid for any chiropractic services rendered to MBCHC patients.

As I am sure you understand, MBCHC is providing this information in the spirit of cooperation with the City. Although we believe that no action against MBCHC is warranted under the circumstances, MBCHC reserves all of its rights to contest any such action.

01/12/2010

While we do not wish to belabor the point, we note that the summary of the federal regulations that the City supplied as an attachment to the FY 2008/09 grant award is consistent with the points made in the attached memorandum. The arrangement regarding radiology services cannot reasonably be construed to be a procurement under 24 CFR Part 84, and the arrangement regarding chiropractic services, to the extent it could be treated as a procurement, was ended once the alleged conflict was disclosed. Moreover, no MBCHC, and specifically no CDBG, funds were paid to Dr. Baum in either situation.

Similarly, 24 CFR 570.611, which addresses non-procurement relationships, on its face applies only to individuals who exercise responsibilities or functions with regard to CDBG activities at either the recipient or sub-recipient level. Dr. Baum had no such responsibilities on behalf of MBCHC. We express no view as to Dr. Baum's responsibilities to the City in that regard.

Please feel free to contact me should you have any questions.

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MICHAEL B. GLOMB
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MEMORANDUM

TO: Kathryn Abbate, MHA, CEO
Mark L. Rabinowitz, MD, CMO
Miami Beach Community Health Center, Inc.

FROM: Michael B. Glomb 

SUBJECT: CDBG Grant Conflict Issue

DATE: December 23, 2009

I have reviewed the CDBG grant documents for the period October 1, 2008 through September 1, 2009. Assuming that the prior grants contained similar language regarding conflicts of interest and taking into account the information that Dr. Rabinowitz has provided with respect to the arrangement with Drs. Baum and Braun, we do not believe that there was a conflict of interest involving Miami Beach Community Health Center, Inc. (MBCHC) as defined in the grant documents or in the federal regulations incorporated therein. In that regard, MBCHC should have a credible defense should the City attempt to take punitive action including, but not limited to, recovery of grant funds.

However, the grant obligates MBCHC to comply with state, county and City of Miami Beach statutes, regulations, ordinances or resolutions governing conflicts of interest. We have not looked into those. That may require further investigation depending on the City's position on this issue. A more detailed analysis of the CDBG grant requirements follows.

Section 22 of the grant agreement, dealing with conflict of interest, states in part:

The Provider [*i.e.* MBCHC] covenants that no person under its employ who presently exercises any functions or responsibilities in connection with Community Development funded activities has any personal financial interests, direct or indirect, in this Agreement. The Provider covenants that in the performance of this Agreement, no person having such conflicting interests shall be employed.

You have advised that neither Dr. Baum nor Dr. Braun exercised any functions or responsibilities on behalf of MBCHC in connection with Community Development

funded activities and that neither had a personal financial interest in the grant agreement as they did not provide any services that were paid for with CDBG funds.

Section 22 of the grant agreement further states: "The Provider [*i.e.* MBCHC] Covenants that it will comply with all provisions of 24 CFR 570.611 'Conflict of Interest'." 24 CFR § 570.611 has two parts. The first requires MBCHC to comply with 24 CFR § 84.42 which mandates that a grant recipient establish a code of conduct governing the performance of its employees engaged in the award and administration HUD-funded procurement contracts. Among other things, no employee, officer, or agent of the recipient may participate in the award or administration of a contract if a real or apparent conflict of interest would be involved.¹ According to the regulation, such a conflict would arise when the individual, a family member, or a partner of the individual has financial interests in the firm selected for an award. As noted above, neither Dr. Baum nor Dr. Braun had any role in the award of contracts under MBCHC's CDBG grant, nor did they have a financial interest in any such contract.

The second part of 24 CFR § 570.611 applies in cases not covered by 24 CFR § 84.42, that is, a transaction not covered by the procurement standards. This section provides that no person who is an employee, agent, consultant, officer, or elected or appointed official of MBCHC or, in this case, the City of Miami Beach, who exercises any functions or responsibilities with respect to CDBG activities, or who is in a position to participate in a decision making process or gain inside information with regard to such activities, may obtain a financial interest or benefit from a CDBG-assisted activity, or have a financial interest in any contract, subcontract, or agreement with respect to a CDBG assisted activity, during their tenure or for one year thereafter. *See* 24 CFR § 570.611(b). This section is broader than section 84.42 in that it covers any functions or responsibilities with respect to CDBG activities, and, presumably, would have precluded Dr. Baum from voting on MBCHC's CDBG award if he had a stake in the CDBG-assisted activities, which you have indicated he did not.

In sum, based on our understanding of the facts, there does not appear to have been a violation of the applicable federal conflict of interest rules on the part of MBCHC.

Importantly, Section 22 of the grant further states that "[MBCHC] covenants that it will comply with State, County and City of Miami Beach statutes, regulations, ordinances or resolutions governing conflicts of interest." The grant also states:

The Provider [*i.e.* MBCHC] shall disclose, in writing, to the City a possible conflicting interest or apparent impropriety that is covered by the [above referenced] provisions. This disclosure shall occur immediately upon knowledge of such possible conflict. The City will then render an opinion, which shall be binding on both parties.

¹ Note that the provisions of 24 CFR § 84.42 are identical to the provisions in 45 CFR § 74.42, which apply to grants awarded by the Department of Health and Human Services. Accordingly, assuming that MBCHC has a procurement code of conduct with respect to DHHS awards, it also should satisfy HUD requirements.

As noted, we have not explored whether any such rules apply in this case. Further, as a City official, Dr. Baum may have been personally subject to a broader conflict of interest policy than MBCHC is under the CDBG award. You have advised that MBCHC ceased dealing with Dr. Baum when he informed you of the purported conflict of interest and the City clearly is on notice of the circumstances (although perhaps not all of the pertinent facts or the applicable conflict of interest principles).

At this point, we recommend that MBCHC engage the appropriate City officials with respect to its position regarding the alleged conflict of interest. It is possible that the City will not agree with our analysis of the CDBG-related provisions or that they will assert that the aforementioned state and local rules require a different result. In either case, MBCHC should insist on a written response. Of course, we would be pleased to assist MBCHC in that regard in the New Year.

As to Dr. Baum, while we do not believe that there would be any present conflict of interest under the CDBG conflict of interest rules, we recommend that MBCHC not engage him until the matter is resolved with the City.

Please do not hesitate to contact us should you have any questions.